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No. 03-475

IN THE

Supreme Court of the United States

RICHARD B. CHENEY,
Vice President of the United States, *et al.*,

Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* NATURAL RESOURCES DEFENSE COUNCIL IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE[1]

The Natural Resources Defense Council ("NRDC") is a non-profit organization with over 400,000 members dedicated to the protection of the environment. NRDC engages in extensive advocacy and public education with regard to the development of environmentally sound energy policies. NRDC – which filed an extensive *amicus* brief and participated in oral argument in the district court, *see* Pet. App. 60a-61a; *see also id.* at 74a, 117a (relying on arguments advanced by NRDC in denying motion to dismiss) – has two significant, interrelated interests in this case.

First, NRDC has an institutional interest in the proper implementation and interpretation of the Federal Advisory Committee Act, 5 U.S.C. App. 2 ("FACA"). The federal government regularly relies on advisory committees for a host of environmental, scientific, and public health-related issues that are of central concern to NRDC and its members, and thus the organization has a substantial interest in ensuring that the federal government properly carries out its responsibilities under the statute. As an outgrowth of that interest NRDC has engaged in extensive litigation under FACA. *See, e.g., NRDC v. Dep't of Energy*, 353 F.3d 40 (D.C. Cir. 2004); *NRDC v. Pena*, 147 F.3d 1012 (D.C. Cir. 1998).

Second, NRDC has a significant organizational interest in obtaining the kind of information sought by the respondents in this case – *i.e.*, details concerning the National Energy Policy Development Group ("NEPDG"), and how the recommendations of the NEPDG and its subgroups were developed. As a result of litigation brought by NRDC against the Department of Energy ("DOE") under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), DOE was ordered

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1. None of the attorneys for the parties in this case authored any of this *amicus* brief, and no one other than NRDC made any monetary contribution to the preparation or submission of this brief. *Amicus* has received the written consent of the parties to file this brief, and these consents are being lodged with this brief.

to release records that provided the public with some understanding of the workings of the NEPDG, although DOE continues to withhold most of these documents from public scrutiny. *See NRDC v. Dep't of Energy*, 191 F. Supp. 2d 41 (D.D.C. 2002); *see also* Brief for the Petitioners ("Pet. Br.") at 6. The sweeping separation of powers arguments advanced by the government in this case may also have a direct bearing on the public's rights of access under FOIA, including NRDC's pending FOIA case against DOE.[2]

SUMMARY OF ARGUMENT

I. On separation of powers grounds, petitioners are asserting a blanket "immunity," Pet. Br. at 42, from "*any* discovery against the Vice President and immediate assistants to the President," regardless of the sensitivity or confidentiality of the particular information sought, or its importance to plaintiffs' FACA claims. *Id.* at 47 (emphasis in original). This Court has never previously sustained such a sweeping assertion of executive power and "immunity" from judicial process – and for good reason. If accepted, this approach would actually erode, rather than safeguard, the separation of powers by drastically curtailing the role of the federal courts in enforcing statutes passed by Congress.

a. Petitioners' argument that the lower courts could not have allowed *any* discovery to proceed against the Executive Branch officials and employees most knowledgeable about the workings of the NEPDG and its subgroups is based on the oft-repeated premise that the lower courts authorized "discovery at least as broad and constitutionally problematic as the disclosure requirements imposed by FACA itself." Pet. Br. at 9. This unsupported assumption, however, has no basis in legal reality, since there is no necessary or even logical relationship between FACA's "disclosure requirements" and the discovery actually authorized by the lower courts.

2. NRDC agrees with the jurisdictional arguments that have been raised by respondents. If, however, the Court addresses the merits, this brief focuses on certain points that are pertinent to any such consideration.

While FACA requires that non-exempt "records, reports, transcripts, minutes," and other documents "prepared for or by each advisory commitee shall be available for public inspection," 5 U.S.C. App. 2 § 10(b), the Court of Appeals has made clear that, to pursue their FACA claims, respondents "must discover *only whether non-federal officials participated* and, if so, to what extent." Pet. App. 17a (emphasis added). Petitioners never explain how such "narrow, carefully focused discovery," Pet. App. 19a, would violate the separation of powers, especially since the lower courts have stressed that petitioners may object, on privilege or other grounds, to the disclosure of any particular information. *See* J.A. 258, 288.

Most conspicuously, petitioners simply ignore respondents' claims that subgroups of the NEPDG were subject to FACA, even if the NEPDG itself was not. *See* 5 U.S.C. App. 2 § 3(2). Petitioners suggest no legitimate reason why respondents should be precluded from discovering information bearing on the structure and composition of subgroups – information that is not reflected at all in petitioners' scant "administrative record." Pet. Br. at 26. Indeed, since, as this Court has held, even "sitting Presidents" may be subject to "to court orders to provide testimony" in civil cases, *Clinton v. Jones*, 520 U.S. 681, 704 (1997), it is difficult to fathom how the Constitution could be violated through discovery focused on whether and how *non*-federal employees participated in the work of the NEPDG or its subgroups.

b. Petitioners' contention that the lower courts should have simply deferred to the government's representation that the NEPDG and its subgroups functioned in a manner that exempted them from FACA, Pet. Br. at 9, also conflicts with basic principles of judicial review of Executive Branch action, particularly how such review has been conducted in FACA cases since that statute's enactment. As in this case, courts construing FACA have frequently authorized narrow discovery aimed at ascertaining whether particular Executive Branch committees were subject to FACA, and whether specific provisions of the Act were violated. Such factfinding has helped courts *avoid* unnecessary constitutional adjudication.

II. Petitioners' contention that FACA could not constitutionally be applied to the NEPDG or its subgroups under any circumstances because this would necessarily "interfere with core Executive Branch functions," Pet. Br. at 28, is, in practical effect, an argument that FACA is unconstitutional on its face, since virtually every advisory committee could be said to implicate the Opinion Clause, Recommendations Clause, or some other constitutional authority vested in the Executive Branch. Petitioners offer no justification for the Court to even address this unprecedented position – which, if adopted, would also call into question the validity of the FOIA and other open government laws – before the lower courts have even determined, based on a factual record, whether FACA applies to the NEPDG or subgroups. In any event, contrary to petitioners' argument, this Court has employed a pragmatic balancing test in considering the constitutionality of statutes such as FACA, *see, e.g., Nixon v. General Services Administration*, 433 U.S. 425 (1977), and the application of that test would also benefit from limited discovery, as the lower courts found.

ARGUMENT

I. PETITIONERS HAVE PRESENTED A SERIOUSLY DISTORTED VIEW OF FACA'S REQUIREMENTS.

Before turning to petitioners' specific arguments, it is important to summarize the reasons why Congress enacted FACA and the modest procedural requirements imposed by the statute. This summary is especially useful because petitioners' brief proceeds on the erroneous assumption that FACA's application to the NEPDG would necessarily result in "extreme interference" with the President's ability to obtain policy advice or make decisions. Pet. Br. at 35. In fact, however, Congress did not enact FACA to "interfere" with, or foreclose, the Executive Branch's use of advisory committees but, rather, simply to ensure that such committees would operate in the public interest.

After holding extensive hearings in 1970 and 1971 on the

substantial control over them," Congress concluded that it was essential to establish a comprehensive system for regulating this influential "fifth arm of the government." Congressional Research Service, *Federal Advisory Committee Act Source Book: Legislative History, Texts, and Other Documents*, 95th Cong., 2d Sess. 293 (Comm. Print 1978) (remarks of Rep. Monagan) ("FACA Source Book"). Of particular pertinence here, Congress found that:

> *[o]ne of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns.* Testimony received at hearings before the Legal and Monetary Affairs Subcommittee pointed out the danger of allowing special interest groups to exercise undue influence upon the Government through the dominance of advisory committees which deal with matters in which they have vested interests.

H. Rep. No. 1017, 92d Cong., 2d Sess. 6 (1972) (emphasis added), *reprinted in* 1972 U.S. Code Cong. & Admin. News 3491, 3496; *see also* 118 Cong. Rec. 30,276 (1972) (Senate staff report submitted by Senator Percy) ("'Viewed in its worst light, the federal advisory committee can be a convenient nesting place for special interests seeking to change and preserve a federal policy for their own ends.'") (quoted in *Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods*, 886 F.2d 419, 425 (D.C. Cir. 1989) (Friedman, J., concurring in the judgment)).

To address these overriding national interests, when FACA was enacted in 1972, Congress recognized that, while advisory committees are "frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government . . . [,] standards and uniform procedures should govern the[ir] establishment, operation, administration and duration. . . ." 5 U.S.C. App. 2 §§ 2(a), (b)(4). FACA was

endorsed the statute's "standards for the establishment, operation, termination, and control of advisory committees," but also directed that the "heads of all executive departments and agencies shall take appropriate action to assure their ability to comply with the provisions of the Act." Executive Order 11,686 (1972), *reprinted in* FACA Source Book at 340.

Consistent with the Congressional purposes underlying the statute, FACA does not regulate the subject matter that advisory committees may consider, nor does it in any way dictate the results of their deliberations. Instead, the Act simply establishes uniform rules governing the procedures and operations of such committees, and seeks to ensure that they meet basic standards of public accountability. Many of these standards parallel provisions found in other open government statutes, such as FOIA, 5 U.S.C. § 552, the Sunshine Act, 5 U.S.C. § 552b, and the Presidential Records Act of 1978, 44 U.S.C. § 2201. As is true with these statutory schemes, the day-to-day implementation of FACA is assigned to Executive Branch officials.

FACA provides that agencies must generally provide the public with "timely notice" of committee meetings. 5 U.S.C. App. 2 § 10(a)(2). However, a committee meeting may be closed to the public in whole or in part if the agency determines that matters to be discussed at the meeting fall within one of the ten exemptions to the Sunshine Act. *Id.* at § 10(d); *see also* 5 U.S.C. § 552b(c). Those exemptions apply, *e.g.*, to matters that must be "kept secret in the interests of national defense or foreign policy," "trade secrets and commercial or financial information," materials "compiled for law enforcement purposes," and matters that would be "likely to significantly frustrate implementation of a proposed agency action." *Id.* Under section 10 of FACA, the committee must keep minutes of each meeting, *see* 5 U.S.C. App. 2 § 10(c), and make the records -- along with any reports, records, or other documents used or generated by the committee -- available to the public, provided that they do not fall within the exemptions to disclosure contained in the FOIA, which also cover such matters as national security, law enforcement, and trade secret material. *Id.* at § 10(b); *see also* 5 U.S.C. § 552(b).

Under section 5 of FACA, an advisory committee must be "fairly balanced in terms of the points of view represented and the functions to be performed." 5 U.S.C. App. 2 §§ 5(b), (c). However, courts have determined that the government has very wide latitude in meeting this requirement by defining the functions of their committees, as well as the type of representation that is relevant to the performance of those functions. *See National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 530 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983).

Since 1972, thousands of advisory committees have been chartered in accordance with FACA and have complied with the Act's various requirements, while still furnishing advice and recommendations to the President and federal agencies. According to a website maintained by the General Services Administration, there are presently 947 "active" advisory committees that are complying with the statute's provisions, including 43 "presidential" advisory committees that have been chartered under FACA. *See http://www.fido.gov/facadatabase*. Examples of such "presidential" committees that *are* complying with FACA include the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction, the Presidential Advisory Council on HIV/AIDS, and the President's Commission to Strengthen Social Security. *Id.*

Plainly, if thousands of committees, including dozens of Presidential bodies – many dealing with highly sensitive and controversial issues – have managed to comply with FACA, then it is not the case that compliance with the statute necessarily "interferes" with the President's ability to obtain advice from such bodies. In any event, the lower courts here have not even had the opportunity to determine *whether* the NEPDG or its subgroups are the types of entities that should be subject to the statute. As we discuss next, petitioners' arguments as to why the courts should be precluded from even making that

determination in light of an appropriate factual record are also based on a fundamental misunderstanding of FACA and how the statute has been enforced by the courts.

II. LIMITED DISCOVERY HAS FREQUENTLY BEEN AUTHORIZED BY COURTS IN RESOLVING FACA CASES, AND SUCH DISCOVERY IS ESPECIALLY IMPORTANT IN THIS CASE.

A. The Discovery Authorized Here Is Not "Tantamount To Relief" For A Violation of FACA.

Petitioners' central justification for why this Court should take the extraordinary step of addressing their sweeping separation of powers arguments *before* the lower courts have even had the opportunity to rule on whether FACA applies here is that the discovery sought by plaintiffs "raises the *same constitutional concerns* as would a final judicial determination that FACA applies." Pet. Br. at 18 (emphasis added); *id.* at 11 ("The discovery that has been ordered raises the same separation-of-powers problems as the statutorily mandated disclosures that would follow from a final determination that FACA applied to the NEPDG."). This contention, in turn, is based on the repeated premise that the district court and D.C. Circuit authorized "wide-ranging discovery" that would be "*tantamount to relief for a proven FACA violation*." Pet. Br. at 9, 47 (emphasis added); *see also id.* at 20-21 ("discovery obligations may, as in this case, be at least as intrusive as the disclosure obligations imposed by FACA itself"); *id.* at 39 ("The outcome of the lawsuits will largely be beside the point, as the remedy for a proven FACA violation is not materially different from a discovery order.").

Of course, since petitioners did not, before appealing, even allow the district court to decide *what* specific discovery would be allowed, and which of petitioners' "legitimate objections" (J.A. 208) to discovery would be sustained, petitioners' asserted concerns with "wide-ranging discovery" are, at minimum, facially premature, and have no basis in any actual ruling made by the district court or court of appeals. *See, e.g.*, J.A. 208 (statement by district court that "*I recognize that there may be*

legitimate objections to the [discovery] plan that raise constitutional concerns and that raise concerns of executive privilege. If so, we'll address those objections and concerns at the appropriate time.") (emphasis added); J.A. 405 (statement by district court that "[c]ompliance with this Court's Orders will not necessarily result in plaintiffs' 'obtaining' *any* discovery, as it is entirely conceivable that defendants could assert specific viable claims of privilege for every responsive document") (emphasis in original); Pet. App. 22a (statement by court of appeals that the "narrow discovery we expect the district court to allow may avoid the need for petitioners even to invoke the [executive] privilege").

In any event, the central supposition of petitioners' brief that the lower courts have already authorized discovery that is "tantamount to relief for a proven FACA violation," Pet. Br. at 47, is unsupported in petitioners' brief, and is simply wrong. In reality, there is no necessary, or even logical, relationship between, on the one hand, what plaintiffs should be entitled to seek in discovery in order to explore the presence of a FACA violation, and, on the other hand, the relief to which plaintiffs may be entitled in the event that the district court and court of appeals were to ultimately rule that such a violation existed. To the contrary, it is clear that the "tightly-reined discovery" authorized by the lower courts, Pet. App. 118a, is much narrower, and very different in kind, from FACA's actual disclosure requirements.

Under FACA, subject to any applicable FOIA exemption, all of the "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying. . . ." 5 U.S.C. App. 2 § 10(b). Consequently, *if* the lower courts were to find that the NEPDG or its subgroups were subject to FACA, they *could* order, as relief for that violation, that non-exempt materials be made available to respondents and other members of the public. *See, e.g., Animal Legal Defense Fund v.*

Shalala, 104 F.3d 424, 431 (D.C. Cir. 1997) ("remand[ing] so that the district court may determine whether there are documents to which the appellants may obtain access" under section 10).

In contrast, to explore their claims that the NEPDG or its subgroups were subject to FACA because they in fact contained non-federal members, respondents are not entitled, nor were they the beneficiaries of any discovery order authorizing them, to receive all of the "records, reports, transcripts, minutes," and other materials subject to public disclosure under section 10(b) of FACA. Rather, as made clear by the court of appeals, the nature of the dispute between the parties narrowly circumscribes the kind of discovery respondents need to pursue their claims – *i.e.*, they "must discover *only whether non-federal officials participated, and if so, to what extent.*" Pet. App. 17a (emphasis added); *id.* at 18a (respondents "need only documents referring to the involvement of non-federal officials," and do not need to pursue broader document production requests).

Hence, not only is petitioners' assertion that the appropriate discovery here is "tantamount" to the relief for a FACA violation baseless and unsupported, but the "narrow, carefully focused discovery" authorized by the lower courts (Pet. App. 19a) can easily be pursued without in any way disclosing the core matters over which petitioners profess concern. Petitioners maintain that they are centrally concerned with "the process by which a President obtains information and *advice from the Vice President, heads of departments and agencies, and assistants to the President* in the exercise of powers committed exclusively to the President by the Constitution. . . ." Pet. Br. at 12 (emphasis added).

Critically, however, to pursue their claims here, respondents do not need – and, under the court of appeals' ruling, will not be permitted – to obtain discovery reflecting "information and advice from the Vice President, heads of departments and agencies, and assistants to the President." Indeed, such information regarding the advisory role played by *government*

officials would not seem to help respondents "establish whether *non*-federal officials participated, and if so, to what extent." Pet. App. 17a (emphasis added).

Conspicuously, while repeatedly raising the specter of "broad" discovery into the inner workings of the Executive Branch (which no court has ever authorized in this case), petitioners never explain why they would suffer *any* demonstrable harm from the specific discovery that is actually pertinent to plaintiffs' claims – let alone why they need wholesale "immunity" from such discovery. Pet. Br. at 42. For example, respondents completely ignore a critical feature of respondents' claims that is at least partially borne out by the existing record – *i.e.*, that there are one or more "subgroups" of the NEPDG that should be complying with FACA because they have non-federal members, even if the NEPDG itself did not have to adhere to the Act. *See, e.g.*, J.A. 146 (allegation in Sierra Club complaint that petitioners formed "Sub-Groups" that "were not composed wholly of full-time officers or employees of the federal government" but, rather, included "[e]nergy industry executives, including multiple representatives of single energy companies, and other non-federal employees").[3]

FACA expressly defines an "advisory committee" as encompassing "any subcomittee or other subgroup" which is "established or utilized by the President" or by an agency in "obtaining advice or recommendations." 5 U.S.C. App. 2 § 3(2). Accordingly, if a subgroup of the NEPDG was established or utilized which contained non-federal members, then that entity would be subject to FACA even if, as petitioners insist, the NEPDG itself was only comprised of federal employees. Indeed, as explained in *Ass'n of American Physicians and Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) ("*AAPS*") – which

3. The allegation that energy industry representatives participated in the drafting of the NEPDG recommendations has been supported by some of the information that has already been disclosed. *See, e.g.*, Don Van Natta, "Executive Order Followed Energy Industry Recommendation, Documents Show," New York Times, April 4, 2002, at A14 (exhibit to district court *amicus* brief).

addressed whether President Clinton's Task Force on National Health Care Reform or its "working group" were subject to FACA – if a committee of advisors is *not* subject to FACA, and hence will avoid public scrutiny under the statute, it is especially critical to evaluate whether subgroups are improperly circumventing the Act. *See id.* at 913 ("when the Task Force itself is considered part of the government – due to the government officials exemption – we must consider more closely FACA's relevance to the working group. For it is the working group now that is the point of contact between the public and the government.").[4]

There is nothing in petitioners' meager "administrative record" – *i.e.*, the January 29, 2001 Presidential memorandum establishing the NEPDG – that discusses the structure or composition of any subgroups or subcommittees employed by the NEPDG, other than a delegation of authority to the Vice

4. While repeatedly critiquing the "*de facto* member doctrine" discussed in *AAPS*, Pet. Br. at 18, petitioners never fully explain the context in which the "doctrine" was applied in that case – which, contrary to petitioners' suggestion, *id.* at 17-18, is directly analogous to the situation here. In *AAPS*, the D.C. Circuit concluded that the Clinton Task Force was *not* subject to FACA due to First Lady Hillary Clinton's membership on the Task Force, because the "phrase 'full-time officer or employee of the government'" could be read to include the First Lady. 997 F.2d at 911. The Court reasoned, however, that its ruling on the exclusion of the Task Force itself necessitated closer scrutiny of the "working group" which had been set up to assist the Task Force, and which was alleged to have included non-federal members. Following a thoughtful analysis of the kinds of factors that would be pertinent to assessing whether the working group would be subject to FACA – such as whether the working group had an "organized structure, a fixed membership, and a specific purpose" and, if so, the extent of involvement by non-federal parties, *id.* at 914-15 – the Court found that "[w]e simply have insufficient material in the record to determine the character of the working group and its members." *Id.* at 915. Consequently, the Court concluded that "we believe further proceedings, including expedited discovery, are necessary before the district court can confidently decide whether the working group is a FACA committee." *Id.* at 915-16. That reasoning applies squarely to this case as well.

President to "establish subordinate working groups to assist the Energy Policy Development Group in its work." J.A. 157. Thus, petitioners' "administrative record" in no way addresses whether such "working groups" were, in fact, formed and, if so, whether they had the kind of structure and function that would subject them to FACA, *see AAPS*, 997 F.2d at 915, and whether they were composed entirely of full-time federal employees.

Consequently, petitioners found it necessary to file, in the district court, a litigation *affidavit* purporting to address those issues, among others. *See* Declaration of Karen Y. Knutson (J.A. 235-41). In that affidavit, Ms. Knutson – the Deputy Assistant to the Vice President for Domestic Policy – states that the Executive Director of the NEPDG (Andrew Lundquist, a DOE employee who was "on assignment to the Office of the Vice President," J.A. 236) had in fact established at least one "Working Group" which "held numerous meetings regarding drafting of the Report." J.A. 240. Ms. Knudson's affidavit further states that "*[t]o the best of my knowledge*, the only attendees at such meetings were full-time Federal employees of the departments, agencies, and offices whose heads constituted, with the Vice President, the NEPDG," with the "exception" of "one individual" who assisted with the "preparation of the NEPDG Report." *Id.* (emphasis added). However, Ms. Knudson also acknowledges that "*I do not recall how many meetings of the staff-level group occurred* or precisely which employees attended, nor did the Office of the Vice President to the *best of my knowledge* keep records at such meetings that reflect such information." *Id.* (emphasis added).

In short, in a litigation affidavit, petitioners have conceded that there *was* at least one subgroup assisting the NEPDG that had regular meetings, although petitioners' brief says nothing whatsoever about that entity or *its* potential FACA coverage, nor does the brief address any other subcommittees that may have been formed by petitioners or federal agencies working on the NEPDG report, despite the fact that respondents' complaints specifically seek relief with respect to any NEPDG

"sub-groups." Moreover, while resisting "*any* discovery" at all from the Office of the Vice President, Pet. Br. at 47 (emphasis in original), including information that might shed additional light on the operations and membership of the Working Group or other subgroups, petitioners have relied on factual assertions from an individual who does not even purport to have *personal* knowledge of the attendees at all Working Group meetings but, rather, has made sworn statements "to the best of [her] knowledge" – without ever even describing the factual basis for her "knowledge," or how complete it is. J.A. 241.

Petitioners have completely failed to explain how limited discovery concerning the operation and membership of the Working Group or other subgroups – including by exploring the accuracy of, and basis for, the factual assertions in Ms. Knudson's affidavit – entails a separation of powers violation. For instance, if, despite the "best of [Ms. Knudson's] knowledge," petitioners *do* have documents reflecting that the regular "attendees at such meetings" included not only employees of federal agencies, but also representatives of energy companies with financial interests in the work of the NEPDG, those records would certainly be pertinent to plaintiffs' claims that the Working Group or other subgroups constituted FACA committees, even if the NEPDG itself did not. But it is difficult to understand how the disclosure of *that* specific information would "implicate[] important separation-of-powers concerns," Pet. Br. at 42 – unless those "concerns" are so much "broader than and antecedent to any specific future claims of privilege," *id.*, that they foreclose even the most pedestrian inquiries into the activities of the Executive Branch.

By the same token, even if respondents had sought to take Ms. Knudson's deposition for the purpose of exploring the specific assertions in her *post hoc* affidavit – *e.g.*, to find out whether *she* in fact attended all of the Working Group and NEPDG meetings and, if not, how she knows who did – rather than simply submit document production requests and interrogatories, as respondents have done to date, it is equally

hard to imagine how that would "violate the[] separation of powers principles in a most direct way." Pet. Br. at 32. Indeed, especially since, as this Court explained in *Clinton v. Jones*, 520 U.S. 681 (1997), even "*sitting Presidents* have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches can scarcely be thought a novelty," *id.* at 704 (emphasis added), it seems inconceivable that simply exploring factual assertions made by a "deputy assistant" to the Vice President as to whether non-federal employees attended certain meetings *necessarily* constitutes a separation of powers violation. *Id.* at 702 ("petitioner errs by presuming that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions"). Once again, however, even if petitioners could articulate some legitimate reason why that, or any other specific discovery, should not take place, the lower courts have made clear that petitioners will have every opportunity to do so before disclosure of anything occurs. *See, e.g.*, J.A. 258 (statement by district court that "I'm not ordering the defendants to turn over any privileged documents whatsoever. I'm just telling them to turn over those documents that aren't privileged pursuant to the panoply of discovery rules that are in place").[5]

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5. This example also highlights why petitioners' reference to the production of "more than 36,000 pages of documents related to the NEPDG," Pet. Br. at 6, is a red herring. The vast majority of those documents were initially disclosed by DOE and other federal agencies in FOIA litigation brought by NRDC and Judicial Watch. While those documents provide some information on the role that the agencies played in supporting the NEPDG process, they do not shed much light on the workings of the NEPDG itself or on the Working Group. In fact, in the FOIA litigation, the government has taken the position that records

(Cont'd)

B. Courts Have Frequently Authorized Discovery In FACA Cases, Rather Than Simply Defer to the Executive Branch's Position As To Which Entities Are Subject To The Statute.

Petitioners' argument that the "President and the Vice President are in the best position to know how the NEPDG's advisory activities were structured" and whether FACA was implicated, Pet. Br. at 23 – and hence the district court could not authorize even limited discovery to develop a factual record for assessing plaintiffs' claims – contravenes fundamental notions of independent judicial review, as well as abundant precedent authorizing discovery in FACA cases. As a general matter, by arguing that the lower courts cannot authorize even carefully circumscribed discovery – subject to petitioners' claims of executive, or any other, privilege – petitioners' position clearly encroaches on the judiciary's authority to determine whether the Executive Branch has obeyed the law.

Defendants' approach violates the rudimentary principle that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Thus, as this Court has explained:

> we have long held that when the President takes official action, *the Court has the authority to determine whether he has acted within the law.* Perhaps the most dramatic example of such a case

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created or obtained by Mr. Lundquist and the other DOE employees, *see* J.A. 238 (describing the "five professionals employed by the Department of Energy who were originally assigned to the Office of the Vice President" to serve as staff for the NEPDG), are not even "agency records" subject to the FOIA. *See* Department of Energy's June 3, 2002 Reply Memorandum in Support of Motion for Summary Judgment , at 4-9, *NRDC v. DOE*, Civ. No. 01-2545 (D.D.C.). Consequently, there has been no disclosure of the core information that respondents need to pursue their claims, *i.e.*, records reflecting whether non-federal employees routinely participated in the work of the NEPDG or Working Group or other subgroups.

> is our holding that President Truman exceeded his constitutional authority when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills in order to avert a national catastrophe []. Despite the serious impact of that decision on the ability of the Executive Branch to accomplish its assigned mission, and the substantial time that the President must necessarily have devoted to the matter as a result of judicial involvement, we exercised our Article III jurisdiction to decide whether his official conduct conformed to the law.

Clinton v. Jones, 520 U.S. at 703 (emphasis added) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). Accordingly, if, as this Court has made plain, in the course of allowing discovery directly against President Clinton to proceed, the federal courts have the Article III authority to determine whether the Executive Branch – including the President himself – has "acted within the law," then the courts necessarily have the requisite authority to allow the factfinding essential to *apply* the law, especially where, as here, petitioners never have coherently explained how discovery tailored to assessing whether and how *non*-federal employees participated in the work of the NEPDG would unduly impinge on Executive Branch powers.[6]

6. Indeed, while repeatedly asserting that discovery here "raises the same separation-of-powers problems" as would a final ruling that the NEPDG must comply with FACA, Pet. Br. at 11, petitioners have not explained how the specific Constitutional provisions that they have invoked are even relevant to the limited discovery authorized by the lower courts. For example, the Opinion Clause expressly applies only to the "Opinion, in writing, *of the Principal Officer in each of the executive Departments*." U.S. Const., Art. II, § 2 (emphasis added). But the written opinions of the "Principal Officer[s]" who participated on the NEPDG – *i.e.*, the Cabinet officials who served as members of the committee – far from being conveyed in confidence to the President, have not only been disclosed, but broadcast, to the public.
(Cont'd)

Petitioners' corollary contention that the lower courts should be foreclosed from authorizing "*any* discovery" against them, Pet. Br. at 47 (emphasis in original), because of the "presumption of regularity that applies to all Executive Branch actions," *id.*, at 42, conflicts with this Court's admonition that this "presumption is not to shield [Executive Branch action] from a thorough, probing, in-depth review" by the courts. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). This argument also disregards extensive FACA precedent, in which courts construing and applying FACA have, consistent with the Federal Rules of Civil Procedure, often authorized discovery aimed at ascertaining whether particular Executive Branch committees and materials were subject to the law, as well as whether particular provisions of the Act were violated, without requiring that Executive Branch deliberations be disclosed. *See, e.g., AAPS*, 997 F.2d at 914 ("We simply cannot determine how to classify the working groups based on the record before us."); *Cummock v. Gore*, 180 F.3d 282, 293 (D.C. Cir. 1999) ("on remand, the District Court must engage in the necessary discovery and fact finding to determine whether any additional materials fall within the parameters to which Cummock is entitled" under FACA); *NRDC v. Pena*, 147 F.3d 1012, 1027 (D.C. Cir. 1998) (remanding for plaintiffs to take discovery against DOE that might support their request for an injunction against use of an advisory committee report prepared in violation of FACA); *NRDC v. Abraham*, 223 F. Supp. 2d 162, 187-89 (D.D.C. 2002) (relying on materials obtained by plaintiffs in discovery to find that committees established by DOE were subject to FACA); *NRDC v. Curtis*, 189 F.R.D. 4, 10 (D.D.C. 1999) ("the discovery sought relates to the general topic

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See http://www.whitehouse.gov/energy (Task Force report). What is not known, but what discovery would ascertain, is whether any *non*-federal employees participated in the work of the NEPDG or subgroups in a manner that would subject them to FACA. By its plain terms, the Opinion Clause does not apply to such information.

of possible violations of FACA and evidence disclosing such violations is relevant").

In this case, as in many other FACA disputes, targeted discovery will assist the lower courts in determining whether any FACA violation has occurred – with regard to the NEPDG or the Working Group or any other subgroups – and, if so, whether relief can be crafted for that violation consistent with the separation of powers. *See* Pet. App. 19a (statement by court of appeals that "if after limited discovery, it turns out that no non-federal personnel participated as de facto NEPDG members, the district court will never have to face the serious constitutional issue lurking in this case"); Pet. App. 117a (statement by district court that "these questions are better addressed only after discovery into the activities and composition of the NEPDG and alleged Sub-Groups. Contrary to defendants' argument, it would be inappropriate for this Court to conduct the fact-intensive inquiry demanded by separation of powers precedent by considering only the Presidential Memorandum").[7]

On the other hand, petitioners' approach – under which the courts must simply defer to the Executive Branch's assurances regarding FACA's inapplicability, rather than allowing an independent inquiry into the pertinent facts – plainly puts the legal cart before the horse, and also runs roughshod over elementary principles of judicial review. Hence, petitioners assert

7. Petitioners complain that discovery in this case is based on an "unsupported allegation in a complaint." Pet. Br. at 9. As this Court has recently reaffirmed, however, this is how civil litigation generally works. Under Fed. R. Civ. P. 8(a)(2), a complaint "must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

that the "de facto member doctrine, *particularly as applied in this case*, has no support in FACA's text," and that respondents are seeking a "standardless, amorphous" review of whether "contacts between government officials and private persons or entities might render a committee or working group an 'advisory committee.'" Pet. Br. at 18 (emphasis added).

In reality, however, neither the "de facto member doctrine," nor any other "doctrine," has even been "applied" by the lower courts in the resolution of this case on the merits. Rather, those courts have merely allowed some limited discovery to proceed – subject, once again, to petitioners' legitimate privilege claims and specific objections – so that the courts will have a factual predicate *for* determining *whether* the involvement by private parties in the work of the NEPDG or Working Group or other subgroups should subject those entities to FACA's coverage. Accordingly, it makes little sense for petitioners to complain about "standardless, amorphous" judicial review, when it is defendants' mid-litigation appeal that has prevented the lower courts from conducting review armed with a concrete factual record, and from exploring, based on such a record, what "standards" *should* be applied in situations such as this one.

For example, if, as petitioners insist, discovery confirms that particular private parties did not regularly participate in the meetings of the NEPDG or Working Group or any other subgroups, then the lower courts would, presumably, find that there was no basis for subjecting these entities to FACA, and no further judicial inquiry would be necessary or appropriate. As explained by Judge Silberman in *AAPS*:

> [w]hen an advisory committee of wholly government officials brings in a 'consultant' for a one-time meeting, FACA is not triggered because the consultant is not really a member of the advisory committee. In that situation, the relationship between the temporary consultant and committee is very similar to the one between the White House officials and various private sector representatives exempted from FACA in [*Nader v. Baroody*, 396 F. Supp. 1231 (D.D.C. 1975)]. We are confident that Congress did not intend FACA to extend to episodic meetings between government officials and a consultant. To do so would achieve the absurd result *Public Citizen* warned against: reading FACA to cover every instance when the President (or an agency) informally seeks advice from two or more private citizens.

997 F.2d at 915.

If, however, discovery were to reveal, *e.g.*, that the same energy industry representatives were permitted to attend and participate in all of the meetings of the NEPDG or Working Group, then there would obviously be a strong statutory argument, in light of FACA's plain language and purposes, that one or both of those entities were subject to FACA's requirements. Indeed, this was the sensible distinction drawn in *AAPS*:

> But a consultant may still be properly described as a member of an advisory committee if his involvement and role are *functionally indistinguishable from those of other members*. Whether they exercise any supervisory or decisionmaking authority is irrelevant. If a 'consultant' regularly attends and fully participates in working group meetings as if he were a 'member,' he should be regarded as a member. Then his status as a private citizen would disqualify the working group from the section 3(2) exemption for meetings of full-time government officials.

Id. (emphasis added).

While there is no need or justification to address the merits at this early phase of the litigation – since the discovery that respondents take may render the issue moot or, at minimum, help illuminate it – petitioners never explain why the distinction drawn in *AAPS* is not a perfectly sound reading of Congress's intent. Contrary to petitioners' insistence, there is nothing

"in FACA's text," Pet. Br. at 18, that would foreclose application of the statute to a situation where the "involvement and role" of private members are "functionally indistinguishable from those of other members" of a committee. *AAPS*, 997 F.2d at 915.

To the contrary, the statute defines an advisory committee as "any committee" which is "established or utilized by the President" or an agency "in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government," 5 U.S.C. App. 2 § 3(2), and it excludes from that definition "any committee that is *composed wholly* of full-time, or permanent part-time, officers or employees of the Federal Government." *Id.* at § 3(2)(C)(1) (emphasis added). Accordingly, the language of the statute clearly *supports* the approach adopted in *AAPS*, since, if a non-government participant is serving on a committee in a manner that is "functionally indistinguishable" from other members, 997 F.2d at 915, then, irrespective of whether the government has *acknowledged* their participation, the committee is not, in fact, "composed wholly" of federal "officers or employees."

On the other hand, petitioners' reading of the statute makes no sense. Petitioners argue, circuitously, that the so-called "de facto member doctrine . . . would effectively repeal both FACA's textual exemption for advisory committees made up exclusively of government officials . . . and its requirement that the 'establishment' of a FACA advisory group must be 'specifically authorized . . . by the President, 5 U.S.C. App. 2 § 9(a), at 5." Pet. Br. at 18. Plainly, however if a private party is allowed to participate in an advisory committee "as if he were a 'member,'" *AAPS*, 997 F.2d at 915, then the committee is not "made up exclusively of government officials" and the statutory "exemption" for such committees would be inapplicable. Hence, an inquiry into the *actual* – as opposed to declared – membership of a committee, far from "repealing" the "textual exemption," is a means of honoring the statute's "text" and underlying intent.

Petitioners' reliance on section 9(a) of the statute is similarly unhelpful to their cause. The statutory ban on the establishment

of any advisory committee "unless such establishment is . . . specifically authorized by statute or the President," or is "determined as a matter of formal record, by the head of the agency involved . . . to be in the public interest in connection with the performance of duties imposed on that agency by law," 5 U.S.C. App. 2 § 9(a), does not, on its face, even remotely *address* the question of how "de facto" members of a committee should be treated. If anything, that provision's express "prohibition on unauthorized advisory committees," Pet. Br. at 18, would seem to undercut petitioners' position, since it reinforces the importance of ensuring that the President's or agency head's "official actions in establishing a committee" are complied with, rather than disregarded by, Executive Branch subordinates. *Id.* at 19.

Indeed, petitioners' peculiar position appears to be that the actual operation of a committee may dramatically (and unlawfully) "deviate[] from the official directive of the President" or an agency head, Pet. Br. at 19 – *e.g.*, with regard to the subject matter addressed by the committee, as well as its actual membership – without any opportunity for judicial oversight or relief. Obviously, that would allow even flagrant violations of FACA to go unremedied, simply because they developed after a committee's initial creation. *Cf. National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 566 F. Supp. 1515, 1517 (D.D.C. 1983) (declaring that particular recommendations of the Executive Committee of the President's Private Sector Survey on Cost Control "were developed and prepared in violation of the requirements" of FACA because the recommendations did "not fall within the narrow area of cost and management control" for which the committee was originally created and constituted).

Petitioners are also clearly wrong in asserting that the distinction drawn in *AAPS* – *i.e.*, between private parties who have only sporadic involvement with a government-formed committee and, on the other hand, such parties who "regularly

attend[] and fully participate[]" in a committee's work, 997 F.2d at 915 – is not "necessary to address the concerns that led to FACA's enactment." Pet. Br. at 19. For example, if, as respondents have alleged, energy industry officials acted as members of the NEPDG or Working Group or other subgroups– and were thereby allowed to heavily (and covertly) influence the advisory process – that would clearly implicate Congress's overriding interest in addressing the "great danger" in the "unregulated use of advisory committees" where "special interest groups may use their membership on such bodies to promote their private concerns." H. Rep. No. 1017, 92d Cong., 2d Sess. 6 (1972). Indeed, the paradigmatic example of a committee which Congress believed should be regulated through FACA was:

> the Advisory Council on Federal Reports, which was organized . . . at the request of the Office of Management and Budget. When Council members met with government officials to consider a proposed national industrial wastes inventory questionnaire, *only representatives of industry were present. No representatives of conservation, environment, clean water, consumer, or other public interest groups were present.*

Id. (emphasis added).

Accordingly, if discovery were to reveal that energy industry officials with vested interests in the outcome of the NEPDG's work were "functionally indistinguishable" from other members of the NEPDG or Working Group (or other subgroups), then this kind of advisory arrangement would unquestionably raise the core "concerns that led to FACA's enactment." Pet. Br. at 19. In fact, petitioners' own contention, based on the Supreme Court's description of FACA, that "Congress was concerned with certain 'specific ills, above all the wasteful expenditure of public funds for worthless committee meetings *and biased proposals*,'" Pet. Br. at 2 (emphasis added) (quoting *Public Citizen v. Department of Justice*, 491 U.S. 440, 453 (1989)), reinforces the importance of ascertaining whether energy industry representatives were permitted to heavily influence "proposals" for legislative and regulatory changes that would directly benefit their industries. *See also* 5 U.S.C. App. 2 §§ 5(b)(3), (c) (providing that the "President, agency heads, or other Federal officials" shall "assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest").[8]

In sum, allowing limited discovery here would afford a factual basis for the lower courts to do precisely what petitioners maintain is necessary – avoid "standardless, amorphous" judicial review, Pet. Br. at 18 – and, instead, as *AAPS* counsels, determine whether FACA's purposes and provisions are implicated based on the actual *evidence* of participation by non-federal employees in the work of the NEPDG or Working Group or other subgroups. On the other hand, it is petitioners who advocate for abstract rulings on sweeping constitutional and other legal issues without any meaningful factual record, and the resolution of which may

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8. Thus, petitioners' argument – based on a law review article – that FACA compliance cannot be required here because "an advisory committee that does not even acknowledge the participation of outside experts cannot simultaneously use the participation of outside experts to bolster the legitimacy of the advisory committee's conclusions," Pet. Br. at 19, erroneously assumes that Congress was only concerned with the use of "outside experts" for that purpose. Rather, Congress was also gravely concerned that "special interest groups may use their membership on such bodies *to promote their private concerns*," H. Rep. No. 1017, 92d Cong., 2d Sess. 6 (1972) (emphasis added) – a problem that is obviously *heightened* when such participation is shielded from public scrutiny. Petitioners' reliance on a regulation previously issued by the General Services Administration ("GSA") is also misplaced, *see* Pet. Br. at 14, because this Court, in *Public Citizen*, specifically ruled that GSA's regulations construing FACA are entitled to little, if any, deference. *See* 491 U.S. at 465 n.12.

prove entirely unnecessary when such a record is finally compiled.[9]

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9. Petitioners also repeatedly, but mistakenly, insist that this Court's ruling in *Public Citizen* somehow supports their position that they should be entirely "immune" from any discovery here. *See* Pet. Br. at 22. *Public Citizen* does not even address the capacity of district courts to compile and consider a factual record *before* deciding whether FACA applies, or constitutionally can apply, to a particular advisory arrangement. To the contrary, in *Public Citizen*, the case was decided on cross-motions for summary judgment in the district court, based on factual materials compiled and submitted by the parties concerning the role played by the American Bar Association Standing Committee on Federal Judiciary ("ABA Committee"), before there was review in this Court. *See Washington Legal Foundation v. United States Dep't of Justice*, 691 F. Supp. 483, 496 (D.D.C. 1988) (granting summary judgment for defendants); *id.* at 486-88 (relying on undisputed material facts submitted by the parties).

Moreover, far from suggesting that the lower courts should refrain from allowing any discovery in order to assess FACA's applicability in particular situations, the Court's reading of the Act in *Public Citizen* actually supports compilation of a factual record. In ruling that FACA did not apply to the ABA Committee, the Court rejected a "literal reading" of what Congress meant by an advisory committee that was "utilized," although not directly "established," by the government. 491 U.S. at 454. Instead, the Court held that a committee created by a non-governmental entity is "utilized" when it is, in fact, being used "'by a department or agency in the same manner as a Government-formed advisory committee'" because it is "amenable to the strict management by" Executive Branch officials. *Id.* at 457 (quoting Executive Order No. 11007). That test for FACA coverage necessitates a case-by-case analysis as to whether there is sufficient "evidence" that Executive Branch officials are engaging in "'strict management'" of a committee created by another entity. *Washington Legal Foundation v. United States Sentencing Commission*, 17 F.3d 1446, 1451 (D.C. Cir. 1994); *see also Food Chemical News v. Young*, 900 F.2d 328, 332-33 (D.C. Cir. 1990).

III. PETITIONERS' ARGUMENT THAT FACA CANNOT BE APPLIED TO THE NEPDG WITHOUT VIOLATING THE SEPARATION OF POWERS IS PREMATURE, AND BASED ON A MISREADING OF THIS COURT'S PRECEDENTS.

Even assuming that FACA applied to the NEPDG or subgroups because they contained non-federal members, "petitioners contend that because the exercise of the President's authority under the Opinions and Recommendations Clause at issue in this case involves powers expressly committed by the Constitution to the Executive, Congress lacks *any authority* to regulate the President's exercise of those powers." Pet. Br. at 41 (emphasis added); *id.* at 28 (arguing that application of FACA would "interfere with core Executive Branch functions"). Plainly, that position, if accepted, would mean that FACA could not be constitutionally applied to *any* advisory committee that the Executive Branch does not wish to subject to the Act's requirements.

For example, under the government's rigid reading of the Recommendations Clause, FACA could not be applied to any committee whose recommendations might bear on legislative proposals. As explained by Judge Silberman in *AAPS*:

> Whenever an executive branch group considers policy initiatives, it discusses interchangeably new legislation, executive orders, or other administrative directives. Thus, virtually any time an advisory group meets to discuss a problem, it will implicate the Recommendation Clause, from which all executive branch authority to recommend legislation derives. *Accordingly, if the application of FACA to groups advising the President or anyone else in the executive branch were constitutionally problematic, insofar as those groups were advising on proposed legislation, FACA would be problematic with regard to virtually all policy advice. Under that reasoning FACA would be constitutionally suspect on its face*[].

997 F.2d at 908 (emphasis added).

Similarly, if the Opinion Clause is construed as strictly forbidding any Congressional regulation of the process by which the President obtains advice from *any* source, as the government insists, Pet. Br. at 30-32, then FACA is clearly unconstitutional *in its entirety* for that reason as well. Even further, because every committee formed to advise the Executive Branch will, by definition, aid in the exercise of *some* constitutional power vested in the Executive Branch – whether it be the Recommendations or Opinion Clauses, the general responsibility to "take care that the laws be faithfully executed," U.S. Const., Art. II, § 3, or some other constitutional provision – the government's position is, in practical effect, an argument that FACA should be deemed unconstitutional as applied to *any* committee that advises the Executive Branch, regardless of its subject matter or composition. Indeed, petitioners' contention that Congress cannot "'inquire into matters which are within the exclusive province' of the Executive" and hence "*cannot empower the public to force disclosure of such matters*," Pet. Br. at 31 (internal citation omitted) (emphasis added), would, if accepted by the Court, not only compel wholesale invalidation of FACA, but also the FOIA, the Sunshine Act, and a host of other statutes that require the Executive Branch to operate with a modicum of openness. *See also* 42 U.S.C. § 7607(d)(4) (requiring public disclosure of certain air quality rulemakings).

There is no conceivable reason for the Court even to *consider* this novel and far-reaching argument before the lower courts have had an opportunity to resolve this case on the merits. In any event, this Court has never adopted an approach to resolving separation of powers issues that even arguably resembles the sweeping, categorical approach espoused by petitioners. To the contrary, in evaluating the constitutionality of similar legislative schemes, including "open government" statutes, the Court has employed a pragmatic balancing test. Thus, in *Nixon v. Administrator, General Services*, 433 U.S. 425 (1977), in upholding the constitutionality of a statute

providing for public access to some of President Nixon's materials, the Court held that:

> in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

Id. at 443; *see also Morrison v. Olson*, 487 U.S. 654, 692-93 (1988); *Common Cause v. NRC*, 674 F.2d 921, 935 (D.C. Cir. 1982) (applying balancing analysis to application of Sunshine Act and rejecting rigid approach to separation of powers).

As both the district court and court of appeals have held, the appropriate context in which to apply the balancing test dictated by this Court's precedents – as well as to make a threshold determination of whether FACA even applies to the advisory arrangement at issue – is *after*, not before, the development of a factual record concerning the actual composition of the NEPDG and its subgroups. For example, if discovery supported an argument that the lower-level Working Group should be deemed subject to FACA, but not the NEPDG itself, that would obviously have a bearing on the extent to which FACA's application would intrude on Executive Branch functions. Indeed, under that scenario, it is not clear how the Opinion Clause would even be implicated, since it applies only to the "Opinion, in writing, of the *principal Officer* in each of the Departments." U.S. Const., Art. II, § 2 (emphasis added). Similarly, the compilation of a factual record would help the lower courts assess the extent to which the Recommendations Clause is actually implicated here, especially since the vast majority of the NEPDG recommendations do not specifically call on

Congress to adopt new legislation but, rather, call for actions to be taken entirely within the Executive Branch itself. *See, e.g.*, 66 Fed. Reg. 34,192 (June 27, 2001) (implementing NEPDG recommendation calling for review of New Source Review regulations); Executive Order 13212 (May 18, 2001) (ordering "Actions to Expedite Energy-Related Projects," as recommended by NEPDG).

Further factual development would also shed light on the other side of the balancing equation. As suggested previously, petitioners arrive at the conclusion that "Congress's legitimate interests are *non-existent*" with regard to FACA's potential application here, Pet. Br. at 34 (emphasis added), only because petitioners ignore entirely Congress's important interest in addressing the "great danger" in the "unregulated use of advisory committees" where "special interest groups may use their membership on such bodies to promote their private concerns," rather than the public good. H. Rep. No. 1017, 92d Cong., 2d Sess. 6 (1972). Hence, if discovery reveals, as respondents allege, that the advisory process at issue *was* dominated by "special interest" influence from energy industry representatives, then that would reinforce a "need to promote objectives within the constitutional authority of Congress." *Nixon*, 433 U.S. at 443; *see also id.* at 445 (the "regulation of materials generated in the Executive Branch" through the open government laws "has never been considered invalid as an invasion of [Executive Branch] autonomy"). Once again, however, judicial consideration of that and the other issues raised by petitioners bearing on FACA's constitutionality should await further factual and legal development.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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Amicus Curiae Brief Unavailable for Filming at This Time